

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LENNY ALVAREZ,

Defendant-Appellant.

UNPUBLISHED

January 5, 2010

No. 288007

Wayne Circuit Court

LC No. 08-003664-FC

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of assault with intent to commit murder, MCL 750.83, for which he was sentenced to 5 to 13 years in prison. We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

Defendant's sole claim on appeal is that the prosecutor's conduct denied him a fair trial. Because defendant did not object to the prosecutor's conduct at trial, this issue is not preserved. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Therefore, appellate relief is precluded unless defendant can establish a plain error that affected the outcome of the trial. *Id.*

Defendant argues that the prosecutor acted improperly by asking him if certain prosecution witnesses had lied. This did occur and was improper. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, any prejudice could have been cured with an appropriate cautionary instruction. *Id.* at 18. It is well settled that error requiring reversal will not be found when any prejudicial effect could have been cured with a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Further, the trial court instructed the jury that it was to determine which of the two scenarios it believed, which witnesses it believed, and how to determine credibility. Jurors are presumed to follow their instructions. *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005). Therefore, while defendant has shown a plain error, he has not shown that the error affected the outcome of his trial.

Defendant next argues that the prosecutor improperly expressed a personal belief in defendant's guilt by stating, "What do I believe? I certainly believe the evidence has shown to me that these gentlemen did take things from Mr. Fields." Although a prosecutor may not express a personal belief in the defendant's guilt, he or she may "relate the facts to his theory of the case, and in so doing say that certain evidence leads him to believe the defendant is guilty." *People v Humphreys*, 24 Mich App 411, 414; 180 NW2d 328 (1970). "Where the prosecutor's

argument is based upon the evidence and does not suggest that the jury decide the case on the authority of the prosecutor's office, the words 'I believe' or 'I want you to convict' are not improper." *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988); *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973). Because the prosecutor's statement was made in reference to the specific evidence at trial, defendant has shown no plain error in this regard.

Defendant also argues that the prosecutor improperly denigrated him by referring to him and his companion as predators, muggers, and killers. The prosecutor did not act improperly by referring to defendant as a predator and a mugger. Such references were reasonable statements supported by the evidence and comported with the prosecutor's theory of the case, which was that defendants harassed Fields, went after him when he tried to avoid them, and then attacked, robbed, and stabbed him. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). To the extent that the prosecutor overstepped his bounds by referring to defendant as a killer, any prejudice could have been alleviated by a curative instruction upon timely objection, *People v Guenther*, 188 Mich App 174, 186; 469 NW2d 59 (1991), and any prejudicial effect was dispelled by the trial court's instruction that the lawyers' arguments are not evidence, *Bahoda*, *supra* at 281. Defendant has not shown that the alleged error affected the outcome of the trial.

Defendant lastly asserts that the prosecutor acted improperly by arguing that defendant and his companion attacked the victim "because they thought nobody would care" and by telling the jury, "I know you care." It is improper for a prosecutor to appeal to the jury's emotions or sympathy. *Watson*, *supra* at 591; *People v Hedelsky*, 162 Mich App 382, 385-386; 412 NW2d 746 (1987). However, even assuming arguendo that the prosecutor's comments were improper, any harmful effect could have been alleviated by a timely curative instruction, *Watson*, *supra* at 586. Moreover, the trial court's instruction that the jury was to decide the case based on the evidence and that it was not to "let sympathy or prejudice influence your decision" dispelled any possible prejudice. *Id.* at 591-592. Defendant has not shown that the alleged error affected the outcome of trial. We perceive no outcome-determinative plain error in this case. *Brown*, *supra* at 134.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra